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12  
13 UNITED STATES DISTRICT COURT  
14 NORTHERN DISTRICT OF CALIFORNIA  
15 SAN FRANCISCO DIVISION  
16

17 B&O MANUFACTURING, INC.,

18 Plaintiff,

19 v.

20 HOME DEPOT U.S.A., INC.,

21 Defendant.  
22

CASE NO. C07 02864 JSW

**DEFENDANT'S NOTICE OF MOTION  
AND MOTION TO DISMISS COUNTS  
TWO AND THREE OF PLAINTIFF'S  
FIRST AMENDED COMPLAINT;  
MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT OF  
THEREOF**

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**NOTICE OF MOTION AND MOTION TO DISMISS**

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that, on September 7, 2007, at 9:00 a.m., or as soon thereafter as the matter may be heard, in Courtroom 3 of the above-entitled court, located at 450 Golden Gate Avenue, San Francisco, California, Defendant Home Depot U.S.A., Inc. ("Home Depot") will, and hereby does, move the Court to dismiss Counts Two and Three of the First Amended Complaint ("Complaint") by Plaintiff B&O Manufacturing, Inc. ("B&O") under Rules 9(b) and 12(b)(6) of the Federal Rules of Civil Procedure.

**SUMMARY OF ARGUMENT**

In a three-count complaint, B&O, a safety netting vendor, has sued Home Depot over two contracts between the parties: an April, 2005 "Memorandum of Understanding" ("MOU," attached to Compl. as Exh. 1), and a January 31, 2006 "Open Balance Refund Agreement" ("Refund Agreement," attached to Compl. as Exh. 2). Counts One and Two allege breach of the MOU and Refund Agreement, respectively. Count Three asserts that the Refund Agreement should be rescinded and all amounts paid by B&O under the Refund Agreement refunded because Home Depot wrongfully induced B&O into signing it.

Count One's allegation that Home Depot failed to buy B&O's products as promised in the MOU is false. In fact, Home Depot pre-paid B&O for Home Depot's entire MOU order. The parties only signed the Refund Agreement because B&O failed to deliver all of the products Home Depot ordered and for which Home Depot pre-paid. Indeed, the parties entered the Refund Agreement only because B&O's failures necessitated scheduling an arrangement for B&O to refund Home Depot's extra payments.

Home Depot does not move to dismiss Count One only because, for purposes of this motion, the Court must assume the truth of B&O's factual allegations. Even assuming the truth of these facts, however, Counts Two and Three should be dismissed as a matter of law. Count Two should be dismissed because, on its face, the Refund Agreement does not include any promise that Home Depot will purchase additional products from B&O, the only promise Count

Two alleges to have been breached. (See Refund Agreement, attached to Compl. as Exh. 2). Count Three should be dismissed because none of the legal theories cited by B&O give rise to a right to rescind the Refund Agreement or to restitution thereunder. In addition, Count Three fails because B&O has waived any right to relief by ratifying the Refund Agreement long after any arguable misconduct by Home Depot had ended.

## MEMORANDUM OF POINTS AND AUTHORITIES

### I. INTRODUCTION

This litigation concerns the business relationship between B&O, a safety netting vendor, and Defendant Home Depot U.S.A., Inc. B&O's First Amended Complaint (the "Complaint") alleges that Home Depot has breached two contracts between the parties. In Count One, B&O alleges that Home Depot failed to purchase B&O's products as promised in an April, 2005 "Memorandum of Understanding" ("MOU," attached to Compl. as Exh. 1). See Compl., ¶¶ 7, 9. In Count Two, B&O alleges that Home Depot also failed to purchase products in violation of the January 31, 2006 Refund Agreement. Compl., ¶ 21. Finally, Count Three alleges that Home Depot wrongfully induced B&O to draft and then enter the Refund Agreement and asks the Court to rescind the Agreement and refund any amounts B&O paid Home Depot pursuant to it. Compl., ¶ 23.

B&O's decision to sue Home Depot for breach of these two contracts demonstrates considerable bravado. The truth is that Home Depot did issue all the purchase orders promised in the 2005 MOU and even *pre-paid B&O the entire amount owed*. After insisting on this pre-payment, B&O failed to deliver all of the products ordered in the MOU. As a result of B&O's failure to deliver nearly \$1.8 million in promised product and B&O's inability to promptly refund Home Depot's pre-payment for this undelivered product, the parties entered into the January 31, 2006 Refund Agreement that allowed B&O to repay Home Depot over time. As the Complaint concedes, B&O drafted the Agreement on its own letterhead, signed the Agreement and then presented it to Home Depot. And although B&O made two payments pursuant to that Refund Agreement, B&O remains substantially indebted to Home Depot on these transactions.

Despite this history, Home Depot has continued to order – and pay for – B&O’s products pursuant to a June 2006 Expense Buying Agreement. B&O’s Complaint makes no mention of this subsequent purchase agreement. Instead, B&O here alleges that Home Depot has breached an alleged oral commitment to purchase “substantial quantities of product” in connection with the Refund Agreement. Compl., ¶ 16. Even more absurdly, B&O alleges that Home Depot coerced and defrauded B&O into signing that Refund Agreement. Given the true circumstances surrounding the MOU and the Refund Agreement, B&O’s decision to sue Home Depot is a curious one.

Regardless of any dispute about the facts, however, B&O’s claims concerning the Refund Agreement in Counts 2 and 3 should be dismissed for failure to state a claim. *See* Fed. R. Civ. P. 12(b)(6). Count Two cannot state a claim because the obligation that B&O seeks to enforce appears nowhere in the Refund Agreement that B&O claims Home Depot has breached. Count Three fails as a matter of law because the Complaint does not plead facts that would give rise to a right to rescission or restitution, and because B&O has waived any right to relief by ratifying the Refund Agreement long after any arguable misconduct by Home Depot had ended.

These defects are not mere technical pleading mistakes; they demonstrate why B&O has no claim for relief in connection with the Refund Agreement. As a result, the Court should dismiss these claims now to narrow the issues on which the parties must conduct discovery.

## **II. COUNT TWO SHOULD BE DISMISSED BECAUSE B&O FAILS TO ALLEGE THE EXISTENCE OF AN ENFORCEABLE PROMISE TO PURCHASE GOODS**

Count Two of B&O’s Complaint seeks to enforce an alleged promise, made in connection with the January 31, 2006 Refund Agreement, that Home Depot would buy (or would continue to buy) products from B&O. Specifically, the Complaint asserts that Home Depot breached the Refund Agreement because Home Depot “failed to provide substantial purchase orders to Plaintiff.” Compl., ¶ 21. This purported obligation is unenforceable as a matter of law because it does not satisfy the statute of frauds. Moreover, even if B&O could overcome that hurdle, the promise B&O alleges represents at most an unenforceable “agreement to agree.”



**A. An Oral Promise to Purchase Goods Is Unenforceable**

The Refund Agreement between B&O and Home Depot, which B&O has attached as Exhibit 2 to its Complaint, unambiguously imposes no obligation on Home Depot “to provide substantial purchase orders” or to make any purchase orders whatsoever. *See* Compl., Exh. 2.<sup>1</sup> The Refund Agreement is simply that – an agreement outlining how B&O will refund \$1,780,838.76 Home Depot paid B&O for products B&O never delivered. *See id.* Despite this omission, B&O alleges that Home Depot orally “promised that if B&O executed [the Refund Agreement], B&O would continue to receive purchase orders for substantial quantities of product from [Home Depot].” Compl., ¶ 16.

Even assuming the truth of B&O’s allegation, an unwritten promise to purchase B&O’s products is legally unenforceable pursuant to the Uniform Commercial Code’s Article 2 statute of frauds. “[A] contract for the sale of goods for the price of \$500.00 or more is not enforceable by way of action or defense unless there is some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought or by his authorized agent or broker.” O.C.G.A. § 11-2-201(1).<sup>2</sup> Because B&O does not allege a written agreement for Home Depot to purchase any substantial volume of product, Count II should be dismissed.

<sup>1</sup> Because B&O attached the Refund Agreement to the Complaint and explicitly references the Refund Agreement therein, the Court may consider the Refund Agreement in addition to the facts pled in the Complaint. *See Hal Roach Studios, Inc. v. Richard Feiner & Co.*, 896 F.2d 1542, 1555 n.19 (9th Cir. 1989); Fed. R. Civ. P. 10(c). Moreover, the Court is “not required to accept as true conclusory allegations which are contradicted by documents referred to in the complaint.” *Steckman v. Hart Brewing, Inc.*, 143 F.3d 1293, 1295-96 (9th Cir. 1998).

<sup>2</sup> Because the Refund Agreement was signed in Atlanta and does not specify a place of performance, the agreement is controlled by Georgia law. *See* Compl., ¶ 15; *International Service Ins. Co. v. Gonzales*, 194 Cal. App. 3d 110, 121 (1987) (stating that “a court will follow the statutory directives of its own state with respect to the choice of law”); *Costco Wholesale Corp. v. Liberty Mut. Ins. Co.*, 472 F. Supp. 2d 1183, 1197 (S.D. Cal. 2007) (“According to California Civil Code § 1646, a contract is to be interpreted according to the law and usage of the place where it is to be performed; or, if it does not indicate a place of performance, according to the law and usage of the place where it is made.”). However, the contractual provisions alleged in Count Two would be unenforceable regardless of which state’s law applied. *See* Cal. Comm. Code § 2201(1) (same as O.C.G.A. § 11-2-201(1)); U.C.C. § 2-201(1) (same).

1           **B.     Home Depot's Alleged Promise Is Unenforceably Vague**

2           Even if B&O could evade the Statute of Frauds, the agreement alleged in Count Two  
3 cannot be enforced because it lacks multiple essential terms and represents at most an  
4 “agreement to agree.” Count Two asserts only that Home Depot orally promised “to provide  
5 substantial purchase orders” to B&O. This supposed promise to purchase contains no specifics  
6 about (1) which products Home Depot promised to purchase; (2) when Home Depot promised to  
7 make these purchases; (3) what price Home Depot promised to pay; or (4) what quantity  
8 constitutes a “substantial” purchase order.

9           In general, an alleged promise cannot be the basis of a legal claim until express agreement  
10 has been reached on all essential terms. “It is well established that no contract exists until all  
11 essential terms have been agreed to, and the failure to agree to even one essential term means that  
12 there is no agreement to be enforced. If a contract fails to establish an essential term, and leaves  
13 the settling of that term to be agreed upon later by the parties to the contract, the contract is  
14 deemed an unenforceable agreement to agree.” *Kreimer v. Kreimer*, 274 Ga. 359, 363 (2001).<sup>3</sup>

15           While the U.C.C.’s Article 2 allows that a contract for the sale of goods may be formed  
16 despite one or more terms being left open, an Article 2 contract has not been formed unless “the  
17 parties have intended to make a contract and there is a reasonably certain basis for giving an  
18 appropriate remedy.” U.C.C. § 2-204 (3); O.C.G.A. § 11-2-204(3); Cal. Comm. Code § 2204(3).  
19 The Complaint does not allege that the parties ever agreed on the multiple terms missing from  
20 the Refund Agreement’s alleged purchase clause.<sup>4</sup> Thus, even assuming the truth of B&O’s  
21 allegations, the Court has no way to identify what products Home Depot promised to buy, at  
22 what price, in what quantities, and over what time frame. As such, no “reasonable basis for  
23 giving an appropriate remedy” exists, and Count Two should be dismissed.

24  
25  
26 <sup>3</sup> See also *Bustamante v. Intuit, Inc.*, 141 Cal. App. 4th 199, 213 (2006) (“Because essential  
terms were only sketched out, with their final form to be agreed upon in the future . . . , the  
parties had at best an ‘agreement to agree,’ which is unenforceable under California law.”).

27 <sup>4</sup> As noted above, there is a written purchase agreement between the parties that post-dates  
28 the Refund Agreement. However, the Complaint includes no allegations about that agreement.

**III. COUNT THREE FAILS TO STATE A CLAIM FOR RESCISSION OR**  
**RESTITUTION AND B&O HAS WAIVED ANY RIGHT TO RESCISSION**

In Count Three, B&O prays for rescission and restitution because B&O entered the Refund Agreement under “duress, and/or fraud, and/or undue influence and/or the violation of rules of professional conduct referenced above.” Compl., ¶ 23. This terse and conclusory allegation cannot serve as the basis for relief. For example, in *Warren v. Fox Family Worldwide, Inc.*, 328 F.3d 1136, 1139 (9th Cir. 2003), the Ninth Circuit held that even on a motion to dismiss, a court need not assume the truth of legal conclusions cast in the form of factual allegations.

Regardless, even assuming the truth of the factual allegations elsewhere in the Complaint, none of those facts would give rise to a right to relief under any of the four legal theories B&O has identified. In addition, because B&O has made payments under the Refund Agreement and has brought suit to enforce it, B&O has waived any claim it might have had for rescission.

**A. Count Three Fails to Allege Facts Warranting Relief Under Any of the Legal**  
**Theories Identified in the Complaint**

According to the Complaint, B&O’s president visited Home Depot’s headquarters on January 31, 2006. Compl., ¶ 15. B&O alleges that during this visit, Home Depot demanded that B&O prepare and sign the Refund Agreement. *Id.* B&O claims that Home Depot threatened that it would cease purchasing B&O’s products unless B&O entered the Refund Agreement and declared that Home Depot’s purchase orders would continue only if B&O agreed. Compl., ¶ 16. Even though B&O concedes that it drafted the Refund Agreement, the Complaint further asserts that Home Depot somehow prevented B&O from consulting with its lawyers while considering whether to sign the Agreement. Compl., ¶ 15. And even though the Complaint concedes “B&O had no direct discussions with [Home Depot’s] legal department” and that B&O presented the signed Agreement to Home Depot’s business representative, the Complaint alleges that Home Depot’s lawyers somehow “participated in the process of coercing [B&O]” to enter the Agreement. *See* Compl., ¶¶ 18-19.



1 These allegations are ridiculous. Even if they were true, none of the Complaint's factual  
 2 allegations give rise to a claim for rescission or restitution under any of the four theories B&O  
 3 lists in Count 3.

#### 4 **1. The Complaint Fails to Allege Duress or Undue Influence**

5 As a matter of law, the facts alleged in the Complaint show neither duress nor undue  
 6 influence. "One may not void a contract on grounds of duress merely because he entered into it  
 7 with reluctance, the contract is very disadvantageous to him, the bargaining power of the parties  
 8 was unequal or there was some unfairness in the negotiations preceding the agreement." *Smith v.*  
 9 *Gordon*, 266 Ga. App. 814, 815-16 (2004); *see also Ackerman v. First Nat'l Bank*, 239 Ga. App.  
 10 304, 305 (1999) ("Economic distress does not constitute legal duress"). Similarly, undue  
 11 influence arises only where a confidential relationship or a "relationship of dominance" is  
 12 wrongfully abused; "a person is not prohibited from exercising proper influence to obtain a  
 13 benefit to himself." *Tidwell v. Critz*, 248 Ga. 201, 206 (1981). Accordingly, to make out a  
 14 claim, the threatened action "must be wrongful to constitute duress and it is not duress to threaten  
 15 to do what one has a legal right to do." *Mobley v. Coast House, Ltd.*, 182 Ga. App. 305, 307  
 16 (1987); *see also id.* (applying same analysis to undue influence claims).<sup>5</sup>

17 Furthermore, a contract may be rescinded based on duress only if a party's consent was  
 18 induced by "imprisonment, threats, or other acts by which the free will of the party is restrained."  
 19 O.C.G.A. § 13-5-6; *Smith*, 266 Ga. App. at 815-16. Similarly, a contract is voidable due to  
 20 undue influence only if "one party is under the domination of another, or by virtue of the relation  
 21 between them is justified in assuming that the other party will not act in a manner inconsistent  
 22 with his welfare, [and the] transaction induced by unfair persuasion of the latter." *Tidwell*, 248  
 23 Ga. at 205 (*citing* Restatement of Contracts, Vol. II, § 497). Of course, the Complaint makes no

24 <sup>5</sup> *See also Sabella v. Litchfield*, 274 Cal. App. 2d 195, 197 (1969) (stating that "the use of  
 25 economic pressure . . . does not constitute duress, provided illegal means are not used," and  
 26 holding further that a threat to cause economic harm through legal means "[is] not an act of  
 27 duress or undue influence"); *CrossTalk Productions, Inc. v. Jacobson*, 65 Cal. App. 4th 631, 645  
 28 (1998) (holding that a claim of economic duress arises only from wrongful, coercive acts such as  
 "the assertion of a claim known to be false [or] a bad faith threat to breach a contract").

1 allegation that Home Depot imprisoned, controlled, or otherwise restrained the free will of  
2 B&O's president.

3 At most, the Complaint alleges that Home Depot threatened to discontinue its business  
4 relationship with B&O, a multi-million dollar manufacturing company, unless B&O signed the  
5 Refund Agreement. Compl., ¶¶ 16, 18. B&O does not allege that Home Depot was subject to  
6 any other contract or other legal obligation to purchase products from B&O in January 2006.<sup>6</sup>  
7 Thus, even if Home Depot indicated that the Refund Agreement was a precondition to any  
8 continued business relationship, those facts would not give rise to a claim of duress or undue  
9 influence.

10 Finally, although Georgia theoretically recognizes "business compulsion" or "economic  
11 duress" as grounds for rescission, "*no Georgia decision [has voided] a contract on the theory of*  
12 *economic duress.*" *Cooperative Resource Center, Inc. v. Southeast Rural Community Assistance*  
13 *Project, Inc.*, 256 Ga. App. 719, 720-721 (2002) (emphasis added). And the Georgia courts have  
14 declined to find duress on threats far more sinister than those alleged here. For instance, in  
15 *Woods v. Wright*, 163 Ga. App. 124, 125-126 (1982), the court found no duress where a property  
16 seller vastly increased his purchase price and demanded full payment in cash upon learning that  
17 the prospective buyer had committed to a \$100,000 investment that would be useless without  
18 buying the property. As a matter of law, therefore, the facts alleged in B&O's Complaint simply  
19 do not show the type of coercion, duress or undue influence required to void a contract.

20 **2. The Alleged Professional Misconduct by Home Depot's Lawyers Is**  
21 **Facially Implausible and Does Not Give Rise to a Legal Claim by**  
22 **B&O**

23 B&O's Complaint next asserts that the Refund Agreement should be rescinded because  
24 Home Depot's lawyers somehow "participated in the process of coercing [B&O]" and prevented  
25

26 <sup>6</sup> Although the parties subsequently entered into an Expense Buying Agreement in June  
27 2006, B&O makes no claim for breach of that agreement and the Complaint does not even  
28 mention it.



1 B&O from consulting its legal counsel. Compl. ¶ 15, 18. Presumably, B&O is contending that  
 2 Home Depot's in-house lawyers violated Georgia Rule of Professional Conduct 4.2(a), which  
 3 states that "[a] lawyer who is representing a client in a matter shall not communicate about the  
 4 subject of the representation with a person the lawyer knows to be represented by another lawyer  
 5 in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by  
 6 constitutional law or statute."<sup>7</sup>

7 First and foremost, B&O's allegation of professional misconduct is outlandish on its face.  
 8 While B&O asserts that Home Depot's lawyers improperly coerced B&O into signing the Refund  
 9 Agreement, the Complaint concedes that "B&O had no direct discussions with [Home Depot's]  
 10 legal department." Compl., ¶¶ 18-19. B&O therefore alleges that Home Depot's *business*  
 11 *employees* negotiated the Refund Agreement "*as agents of [Home Depot's] legal department,*"  
 12 and that this somehow demonstrates wrongful conduct on the part of Home Depot's lawyers.  
 13 Compl., ¶ 19 (emphasis added). Moreover, the Complaint infers all of these "facts" from the  
 14 approval stamp Home Depot's legal department apparently placed on the Refund Agreement  
 15 *after* B&O presented a signed copy to Home Depot's business representative. Compl., ¶ 17.

16 These nonsensical allegations turn the attorney-client relationship on its head: it should  
 17 go without saying that a corporation's business employees do not negotiate a contract as the  
 18 agents of their legal counsel. Moreover, if B&O were correct that lawyers who communicate  
 19 only with their own clients are nevertheless "in indirect communication" with an adverse  
 20 represented party, thereby violating Rule 4.2(a), no lawyer could ever advise his or her client on  
 21 any contested matter. In *Bell Atlantic Corp. v. Twombly*, \_\_ U.S. \_\_, 127 S.Ct. 1955, 1974;  
 22 167 L.Ed.2d 929 (2007), the Supreme Court recently held that a Complaint should be dismissed  
 23 unless it pleads "enough facts to state a claim to relief that is plausible on its face." Because  
 24 B&O's Complaint does not meet that standard, this Court need not accept B&O's implausible  
 25 accusations of misconduct in assessing this motion to dismiss.

26  
 27 <sup>7</sup> See also Cal. R. of Prof. Conduct § 2-100 (same).

1 Second, an attorney's breach of the professional rules categorically does not give rise to a  
 2 cause of action. "[W]hile the Code of Professional Responsibility provides specific sanctions for  
 3 the professional misconduct of the attorneys whom it regulates, it does not establish civil liability  
 4 of attorneys for their professional misconduct, nor does it create remedies in consequence  
 5 thereof." *Davis v. Findley*, 262 Ga. 612, 613 (1992).<sup>8</sup> As the Preamble to the Model Rules of  
 6 Responsibility explains,

7 Violation of a Rule should not give rise to a cause of action nor should it create  
 8 any presumption that a legal duty has been breached. The Rules are designed to  
 9 provide guidance to lawyers and to provide a structure for regulating conduct  
 10 through disciplinary agencies. They are not designed to be a basis for civil  
 11 liability. Furthermore, the purpose of the rules can be subverted when they are  
 invoked by opposing parties as procedural weapons. The fact that a Rule is a just  
 basis for a lawyer's self-assessment, or for sanctioning a lawyer under the  
 administration of a disciplinary authority, does not imply that an antagonist in a  
 collateral proceeding or transaction has standing to seek enforcement of the Rule.

12 Am. Bar Ass'n Cent. for Prof. Resp., *Annot. Model Rules of Prof. Conduct*, Preamble, ¶ 20 at 4  
 13 (5th ed. 2003). Accordingly, even if B&O's allegations of attorney misconduct were true (or  
 14 made any sense), they would not support any cause of action against Home Depot and they  
 15 cannot entitle B&O to relief from the Refund Agreement.

### 16 3. The Complaint Fails to Plead Fraud With Particularity

17 Rule 9(b) requires that "[i]n all averments of fraud or mistake, the circumstances  
 18 constituting fraud or mistake shall be stated with particularity." Fed. R. Civ. P. 9(b). The  
 19 purpose of Rule 9(b) is to place the defendants on notice of the precise misconduct with which  
 20 they are charged and to safeguard defendants against spurious charges of fraudulent behavior.  
 21 *Bly-Magee v. California*, 236 F.3d 1014, 1018 (9th Cir. 2001). A complaint alleging fraud must  
 22 explicitly identify the "'who, what, when, where, and how' of the misconduct charged." *Vess v.*  
 23 *Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1106 (9th Cir. 2003). Thus, under Rule 9(b), "mere  
 24 conclusory allegations of fraud are insufficient." *Bly-Magee*, 236 F.3d at 1019 (citations and

25 <sup>8</sup> See also Cal. R. Prof. Conduct § 1-100 ("These rules are not intended to create new civil  
 26 causes of action. Nothing in these rules shall be deemed to create, augment, diminish, or  
 27 eliminate any substantive legal duty of lawyers or the non-disciplinary consequences of violating  
 28 such a duty.").

punctuation omitted).

In plain violation of this heightened pleading requirement, Count Three's one-word assertion that Home Depot committed "fraud" contains no particularity or explanation at all. Compl., ¶ 23. Under Rule 9(b), Home Depot—and this Court—should not be required to piece together the allegations from elsewhere in B&O's Complaint to construct a viable fraud claim in Count Three.

In any case, the only false statement alleged anywhere in the Complaint is Home Depot's promise to issue "purchase orders for substantial quantities of product" at some point in the future. Compl., ¶ 16. But "fraud cannot be predicated upon statements which are promissory in their nature as to future acts." *Jernigan Auto Parts, Inc. v. Commercial State Bank*, 186 Ga. App. 267, 271-72 (1988) (citing *First Nat'l Bank & Trust Co. v. Thompson*, 240 Ga. 494, 495 (1978)).<sup>9</sup> Because the Complaint identifies no other alleged false statement, the Court should dismiss Count 3 to the extent it depends on any fraud theory.

#### **B. B&O Has Waived Any Right to Rescission**

Even if B&O could overcome these defects, B&O has waived the relief it seeks in Count 3 by ratifying the Refund Agreement. The only wrongful conduct alleged in the Complaint occurred on January 31, 2006, the day the Refund Agreement was signed. *See* Compl., ¶¶ 15-19. Thus, prior to filing this lawsuit, B&O had nearly eighteen months to recognize that it was coerced or defrauded into signing the Refund Agreement and to repudiate the Refund Agreement on that basis. Instead, B&O – who drafted the Refund Agreement on its own letterhead – acknowledged its duty to refund Home Depot for undelivered products, made payments to Home Depot pursuant to the Refund Agreement, and raised no objection to the Refund Agreement before it filed suit. *See* Compl., ¶ 15 (acknowledging that B&O drafted the Refund Agreement), ¶ 23 (demanding "restitution of all amounts [B&O] paid" under the Refund

<sup>9</sup> *See also Russ Lumber & Mill Co. v. Muscupiabe Land & Water Co.*, 120 Cal. 521, 529 (1898) ("A mere promise to perform an act in the future is not, in a legal sense, a representation, nor does a failure to perform such promise convert it into a false representation").



1 Agreement). By failing to repudiate the Refund Agreement, by partially performing under it, and  
 2 by suing to enforce the Refund Agreement in Count Two, B&O has ratified the Refund  
 3 Agreement and thereby waived any rescission claim.

#### 4 **1. B&O Has Waived Any Claims of Duress or Undue Influence**

5 An agreement that would otherwise be voidable on grounds of duress or undue influence  
 6 is ratified when the coerced party partially performs under the contract after the duress or undue  
 7 influence has ended. *See Woods*, 163 Ga. App. at 126 (“assuming the appellants might have had  
 8 a duress defense to enable them to void their note, they waived it and ratified their obligation by  
 9 subsequently making a partial payment when any duress by the seller in increasing his terms of  
 10 sale was at an end.”); *Tidwell*, 248 Ga. at 207 (“Tidwell waived his claim of duress when he  
 11 ratified the March 1980 contract by accepting benefits and performing under it. . . . Tidwell  
 12 [also] waived any claim of undue influence when he ratified the agreement.”). The Complaint  
 13 makes no allegation that Home Depot unduly influenced or coerced B&O at any time after  
 14 January 31, 2006. Nevertheless, the Complaint acknowledges that B&O has made payments for  
 15 which it now seeks restitution. Compl., ¶ 23. Accordingly, B&O’s duress and undue influence  
 16 claims fail as a matter of law.<sup>10</sup>

#### 17 **2. B&O Has Waived Any Claims of Fraud**

18 “A party claiming he was fraudulently induced to enter a contract has two possible  
 19 remedies: (1) to promptly rescind the contract after discovering the fraud and sue in tort for the  
 20 recovery of the contract’s consideration, as well as any other damages resulting from the fraud; or  
 21 (2) [to] affirm the contract and sue for damages resulting from the contract.” *McHale v. HJGM,*  
 22 *Inc.*, 252 Ga. App. 641, 644 (2001) (citations omitted).<sup>11</sup> Given that B&O signed the Refund

23 <sup>10</sup> *See also In re Marriage of Burkle*, 139 Cal. App. 4th 712, 751 (2006) (duress and undue  
 24 influence claims are waived when party unreasonably delays in repudiating the contract or ratifies  
 25 the contract through conduct); Cal. Civ. Code § 1588 (“A contract which is voidable solely for  
 26 want of due consent, may be ratified by a subsequent consent”).

27 <sup>11</sup> *See also B. C. Richter Contracting Co. v. Continental Cas. Co.*, 230 Cal. App. 2d 491,  
 28 500 (1964) (“Affirmation of the contract, on the one hand, and rescission and restitution on the  
 other, are alternative remedies. Election to pursue one is a bar to invoking the other.”).

1 Agreement eighteen months ago, B&O indisputably learned well before B&O filed the instant  
 2 lawsuit that Home Depot would not make orders that B&O thought satisfied the Refund  
 3 Agreement's alleged promise to issue "substantial purchase orders." *See Capital Partners,*  
 4 *L.P. v. Westinghouse Elec. Corp.*, 223 Ga. App. 539, 543 (1996) (holding that waiting seven  
 5 months to rescind after the discovery of a fraud "is too late as a matter of law to constitute an  
 6 effective rescission"). "It is incumbent upon a party who attempts to rescind a contract for fraud  
 7 to repudiate it promptly on discovery of the fraud. . . . If he does not, he will be held to have  
 8 waived any objection, and to be conclusively bound by the contract as if no fraud or mistake had  
 9 occurred." *Flair Fashions, Inc. v. SW CR Eisenhower Drive, Inc.*, 207 Ga. App. 78, 79 (1993).<sup>12</sup>

10 Not only did B&O fail to repudiate the Refund Agreement during those 18 months, B&O  
 11 made payments under the Agreement and now sues to enforce its alleged terms. A party who  
 12 partially pays under a contract "is conclusively deemed to have waived [claims of] duress and  
 13 fraud if at the time of the partial payment he has knowledge of all the facts upon which he now  
 14 bases his claim." *Jernigan Auto Parts, supra*, 186 Ga. App. at 271-72. As a matter of law,  
 15 therefore, B&O's failure to repudiate the Refund Agreement upon learning of Home Depot's  
 16 alleged coercion and fraud, its partial performance under the Agreement, and its attempt to  
 17 enforce the Agreement in Count Two have waived any claim for rescission. Accordingly, the  
 18 Court should dismiss Count III.

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 25 <sup>12</sup> See also *Black Hills Investments, Inc. v. Albertson's, Inc.*, 146 Cal. App. 4th 883, 895-96  
 26 (2007) ("a claim for damages for fraud may be waived when the injured party ratifies the subject  
 27 transaction or contract with full knowledge of the fraud"); O.C.G.A. § 13-4-60 ("in order to  
 28 rescind, the defrauded party must promptly, upon discovery of the fraud, restore or offer to  
 restore to the other party whatever he has received . . .").



1 **IV. CONCLUSION**

2 For the reasons set forth above, Home Depot's partial motion to dismiss should be  
3 granted, and Counts Two and Three should be dismissed.

4  
5 DATED: July 18, 2007

SEDGWICK, DETERT, MORAN & ARNOLD LLP

6  
7 By: 

8 AMBER RYE BRUMFIEL  
9 Attorneys for Defendant  
10 HOME DEPOT U.S.A., INC.  
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**PROOF OF SERVICE**

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is Sedgwick, Detert, Moran & Arnold LLP, One Market Plaza, Steuart Tower, 8th Floor, San Francisco, California 94105. On July 18, 2007, I served the within document(s):

**DEFENDANT'S NOTICE OF MOTION AND MOTION TO DISMISS COUNTS TWO AND THREE OF PLAINTIFF'S FIRST AMENDED COMPLAINT; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF THEREOF**

**[PROPOSED] ORDER ON DEFENDANT HOME DEPOT U.S.A., INC.'S MOTION TO DISMISS COUNTS TWO AND THREE FOR FAILURE TO STATE A CLAIM UPON WHICH A RELIEF MIGHT BE GRANTED**

- ☒ FACSIMILE - by transmitting via facsimile the document(s) listed above to the fax number(s) set forth on the attached Telecommunications Cover Page(s) on this date before 5:00 p.m.
- ☒ MAIL - by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at San Francisco, California addressed as set forth below.
- ☐ PERSONAL SERVICE - by personally delivering the document(s) listed above to the person(s) at the address(es) set forth below.
- ☐ OVERNIGHT COURIER - by placing the document(s) listed above in a sealed envelope with shipping prepaid, and depositing in a collection box for next day delivery to the person(s) at the address(es) set forth below via .

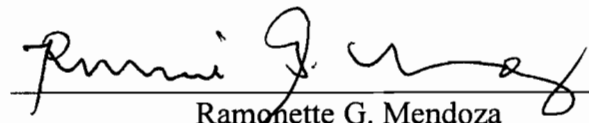
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Attorneys For Plaintiff B&O Manufacturing,  
Inc.

I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Executed on July 18, 2007, at San Francisco, California.

  
Ramonette G. Mendoza